STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

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February 23, 2010

Chief Justice of the State of California and
Associate Justices of the Supreme Court of California
350 McAllister Street, 1st Floor
San Francisco, CA 94102

Re: *People v. David Earl Williams*
California Supreme Court Case No. S029490
Appellant's responsive brief

Dear Mr. Chief Justice and Associate Justices:

Pursuant to the Court's order of February 23, 2010, appellant submits this response to the letter brief filed by respondent on January 25, 2010.

In 2002, when respondent filed its initial Respondent's Brief in this Court, it conceded that the trial court had erred in failing to instruct the jury *sua sponte* with CALJIC No. 8.86, which required "factor (c)" prior convictions to be proved beyond a reasonable doubt. In respondent's words:

> At the penalty phase, *a jury must find prior felony convictions*, as well as prior criminal acts involving violence, to be true *beyond a reasonable doubt* before these factors can be considered in aggravation. And, a trial court has *a sua sponte duty to so instruct.*

(Respondent's Brief, page 105, emphasis added.) In support of this concession, respondent cited two decisions, *People v. McClellan* (1969) 71 Cal.2d 793, 804, and *People v. Medina* (1995) 11 Cal.4th 694, 763. (*Ibid.*)

More recently, in its letter brief of January 25, 2010, respondent set forth CALJIC No. 8.86 in its entirety and cited three more cases – *People v. Harris* (2005) 37 Cal.4th 310, 360; *People v. Davenport* (1985) 41 Cal.3d 247, 280; and *People v. Robertson* (1982) 33 Cal.3d 21, 53, 60 – for the proposition that "normally such an instruction is required" *sua sponte.*

Nevertheless, respondent now takes the opposite position, claiming that "well established authority" imposed no such *sua sponte* duty upon appellant's trial court. (Respondent's letter brief ["RLB"], p. 1.) Moreover, respondent now argues that CALJIC No. 8.86 does not even apply to prior convictions (RLB, p. 4), and that its new counterpart, CALCRIM No. 765, "is an apparent contradiction" insofar as it repeatedly uses the words "convicted" and "convictions." (RLB, p. 6.) However, while standard

jury instructions are not binding authority, they are certainly instructive as to what is "well established authority" in California. And as was pointed out in appellant's February 2nd letter brief ("ALB"), as recently as August 2009, this Court noted that a trial court has no duty to instruct the jury in the penalty phase with the burden of proof, *"except for prior violent crimes evidence and prior felony convictions under section 190.3, factors (b) and (c)."* (*People v. McWhorter* (2009) 47 Cal.4th 318, 379, emphasis added.) (ALB, p. 3.) While *McWhorter* does not state *which* burden of proof the trial court should use, given that the standard instructions require proof beyond a reasonable doubt with respect to both factor (b) and factor (c), it is reasonable to assume that the trial court has a duty to so instruct the jury.

Moreover, requiring that prior convictions introduced in the penalty phase of a capital trial be proved to the jury beyond a reasonable doubt is consistent with how California law deals with prior convictions in other contexts as well. For example, under Penal Code sec. 190.2, subdivision (a) (2), the existence of a prior murder conviction special circumstance must also be proved beyond a reasonable doubt. (*Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1306-1307). In the case of sentence enhancements for recidivism, prior convictions must also be proven beyond a reasonable doubt. (*People v. Allen* (1999) 21 Cal.4th 424, 436 ["In order to rely on the prior conviction in sentencing . . . the People retain the burden of proving, beyond a reasonable doubt, that the defendant suffered the conviction.].)

In the context of the penalty phase of a capital trial, California's long-standing practice was to require that evidence of "other criminal conduct" be proved to a jury beyond a reasonable doubt. (*People v. Stanworth* (1969) 71 Cal.2d 820, 840; *People v. Varnum* (1969) 70 Cal.2d 480, 520; *People v. Tahl* (1967) 65 Cal.2d 719; *People v. Hillery* (1967) 65 Cal.2d 795, 805; *People v. Mitchell* (1966) 63 Cal.2d 805, 817; *People v. Polk* (1965) 63 Cal.2d 443, 450-451.) This requirement was premised upon the belief that "in the penalty trial the same safeguards should be accorded a defendant as those which protect him in the trial in which guilt is established." (*People v. Terry* (1964) 61 Cal.2d 137.)

While a few recent decisions have drawn a distinction between "other crimes" for which a defendant had been convicted [factor (c)] and "other crimes" for which there had been no previous adjudication [factor (b)][1], this Court had not previously made the distinction. Historically, both categories were considered together and both were described as "other crimes," or "other criminal conduct" which had to be proved to a jury

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[1]E.g., *People v. Kennedy* (2005) 36 Cal.4th 595, 637; *People v. Pinholster* (1992) 1 Cal.4th 865, 965; *People v. Wright* (1990) 52 Cal.3d 367, 437; *People v. Gates* (1987) 43 Cal.3d 1168, 1202. Appellant has previously explained how these two lines of cases have developed, each relying on previous cases which did not eliminate the need for proving "prior crimes," including those for which the defendant had been convicted, beyond a reasonable doubt. (ALB 3-6.)

beyond a reasonable doubt in order to be considered in the penalty phase of a capital trial. (*People v. Hillary, supra*, 65 Cal.2d at p. 805 [defendant's argument that "other criminal conduct" could *only* mean prior *convictions* was rejected, suggesting that both prior convictions and prior unadjudicated crimes were, together, considered "other crimes" for purposes of the penalty trial.].) More recent decisions have also presumed that "other crimes" included prior convictions, by holding that such crimes could be introduced in the penalty phase even if there had been no conviction for that crime. (See, e.g., *People v. Phillips* (1985) 41 Cal.3d 29, 68.)

While respondent claims that a contrary rule is "well established," the cases respondent relies upon are not well-founded, as they have been premised upon cases which did not so hold. (See ALB, pp. 3-6.)

Finally, respondent concludes that, based upon the quantum of proof which was presented on appellant's prior convictions, the trial court had no *sua sponte* duty to instruct the jury that the convictions had to be proved beyond a reasonable doubt. (RLB, page 6.) While the quantum of proof may be relevant to whether an error is harmless, it does not address the Court's question here: whether the instruction was required in the first place. Other than *characterizing* the issue as one that is well-established (RLB, page 1), respondent has provided no analysis of the cases, or the policy behind those cases, which do in fact require that prior convictions be proved beyond a reasonable doubt.

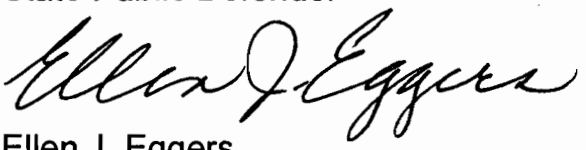
While neither the CALJIC nor the CALCRIM instructions are binding upon this Court, they are certainly strong evidence that the judges and practitioners who formulated the instructions concluded that California law in fact adopted this standard of proof for prior convictions and that trial judges had a duty to give the instruction *sua sponte.* Given what is at stake in the penalty phase of a capital case and this Court's recognition of the "overriding importance" of evidence of adjudicated and unadjudicated prior crimes "to the jury's life-or-death determination" (*People v. Robertson, supra*, 33 Cal.3d at p. 54), and considering that in other contexts California requires prior convictions be proved beyond a reasonable doubt, this Court should retain the standard of proof expressed in both CALJIC No. 8.86 and CALCRIM No. 765.

While the fact of a prior conviction will generally be fairly simple to prove and is often accomplished by way of a stipulation or introduction of the so-called "prison packet," it is conceivable that some prior convictions are not so straightforward, as was true in appellant's case here. The jury was never told that defense counsel had stipulated to the two priors; rather, the stipulation was only presented to the court, outside of the jury's presence. In the case of the juvenile adjudication, it did not provide a legal basis for a prior conviction under factor (c) and, in any event, was not factually supported by the wholly insufficient evidence which the State offered.

For all of the reasons stated above, as recognized in both the CALJIC and recently enacted CALCRIM standard jury instructions, the trial court has a *sua sponte* duty to instruct the jury that prior criminal conduct, whether it is unadjudicated conduct or whether it has resulted in a prior felony conviction, must be proved beyond a reasonable doubt, in order to be considered as aggravating evidence in the penalty phase of capital trial.

Respectfully submitted,

Michael J. Hersek
State Public Defender



Ellen J. Eggers
Deputy State Public Defender
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DECLARATION OF SERVICE BY MAIL

Case Name: **People v. David Earl Williams**
Case Number: **Supreme Court No. Crim. S029490**
Superior Court No. A579310-01

I Saundra Alvarez, declare that I am over 18 years of age, a citizen of the United States, and not a party to the within cause; my business address is 801 K Street, Suite 1100, Sacramento, California 95814. I served a copy of the following document(s):

APPELLANT'S RESPONSIVE LETTER BRIEF

by enclosing them in an envelope and
/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/ X / placing the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelope was addressed and mailed on February 23, 2010, as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 23, 2010, at Sacramento, California.

Saundra Alvarez

Saundra Alvarez